

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JAMES MADISON and U.S. POSTAL SERVICE,
EAST NEW YORK STATION, Brooklyn, NY

*Docket No. 98-2305; Submitted on the Record;
Issued August 20, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof in establishing that he sustained a recurrence of disability on October 2, 1996; (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) constituted an abuse of discretion; and (3) whether the position of letter carrier modified fairly and reasonably reflected appellant's wage-earning capacity effective August 30, 1997, the date that it adjusted his compensation.

The facts in this case indicate that on July 15, 1995 appellant, then a 36-year-old letter carrier modified, filed an occupational disease claim, alleging that he aggravated his back by lifting parcels. He stated that he first realized his condition was aggravated by his employment on July 10, 1995. After developing the factual evidence, the Office accepted the claim for aggravation of lumbar and cervical strain. Surgery for an anterior cervical discectomy at C4-5, C5-6 was later authorized and performed on February 26, 1996. On September 26, 1996 appellant was returned to four hours limited duty in a modified letter carrier position which contained physical restrictions of no lifting over 20 pounds, no pulling or pushing, no reaching above the shoulder, and no repetitive flexion of neck. On October 11, 1996 appellant filed a recurrence claim alleging that on October 2, 1996 he "over extended myself by lifting too much and moving my back and neck which [caused] muscle spasms and lower back pain. I strained." Appellant did not return to work after October 2, 1996.

By letter dated October 24, 1996, the Office informed appellant of the type of evidence needed to support his claim. This was to include either showing that there was a change in the nature and extent of his injury-related condition or that there was a change in the nature and extent of his light-duty requirements.

In a statement dated October 2, 1996, appellant indicated that his "job description was changed to include the duties of a registered mail clerk." In an October 10, 1996 medical report, Dr. Jeffrey D. Klein, an orthopedic surgeon and appellant's treating physician, stated that over

the last two weeks, appellant appeared to have developed a muscular strain of his neck which was resolving with aggressive therapy. He recommended avoiding heavy work and continuation of physical therapy for neck strengthening.

By letter dated April 18, 1997, the Office sent appellant a copy of a teleconference held on April 16, 1997 between the Office, the employing establishment and appellant. During the conference, the employing establishment indicated that appellant's light-duty position had changed, but that appellant was not required to work outside his medical restrictions. The employing establishment indicated that appellant was responsible for completing return notices for parcels which were unable to be delivered so that patrons could pick up their parcels at the post office and answering telephones. Appellant stated that when a postal patron asked him to resend their packages, he was required to lift the package, regardless of the weight and place it in the proper location for delivery. He asserted that he could obtain affidavits to substantiate that he was required to perform these duties. Appellant was informed that he needed to submit proof that he was performing duties outside of his restrictions. He was also informed that unless he could establish that he was performing duties outside of his medical restrictions, medical reports would be insufficient to establish his claim as they would be based on an inaccurate factual background. Appellant was given 15 days to address any inaccuracies in the information obtained during the telephone conference.

On July 11, 1997 the Office received a letter from appellant which asserted that his duties were to provide customer service over the telephone and to write-up return notices for parcels. He stated that these duties required excessive movement of his back and neck which aggravated his condition.

In a July 3, 1997 medical report, Dr. Charles A. Kaplan, a physiatrist, stated that during the time period of (October 16, 1996) through (December 16, 1995)¹ appellant was in severe pain secondary to a significant intervertebral disc herniation which was critically impinging on the spinal cord. Dr. Kaplan further stated that appellant was awaiting authorization for spinal fusion surgery. He stated that the physical examination findings continued to suggest neurological deficits in the upper and lower extremities which stemmed from appellant's spinal injuries. Dr. Kaplan informed that rehabilitative care was necessary to support continued pain reduction, maintain muscle tone to prevent further instability and facilitate postoperative healing, and to prevent deconditioning. No mention was made pertaining to appellant's ability to work.

By decision dated October 15, 1997, the Office denied appellant's recurrence claim on the grounds that the evidence of record failed to establish either a change in the nature or extent of his injury related disability or the nature and extent of his light-duty position. In the attached memorandum dated October 8, 1997, the Office stated that there was no change in appellant's light-duty assignment as the "new" duties correspond directly with his approved light-duty assignment. Thus, the Office found that the duties appellant was performing were within his medical restrictions. The Office noted that appellant did not provide any evidence to support that his light-duty assignment was changed or that he was required to work outside of his medical restrictions.

¹ The year 1995 appears to be a typographical error and should refer to the year 1996.

By letter decision of October 14, 1997, the Office placed appellant on the periodic rolls for four hours of compensation. They also found that the position of letter carrier modified fairly and reasonably reflected appellant's wage-earning capacity effective August 30, 1997, the date it adjusted his compensation.

In an October 22, 1997 reconsideration request, appellant submitted two forms titled "affidavit for reconsideration," consisting of, for each, an expert from the October 8, 1997 memorandum with an added typed statement: "I agree with [appellant's] account of the events as stated in the letter above." Each form was signed by two different people on October 22, 1997.

By decision dated January 5, 1998, the Office denied appellant's reconsideration request as the evidence submitted was found to be of an immaterial nature and not sufficient to warrant review of the prior decision.

In a letter dated April 26, 1998, appellant again requested reconsideration stating that he had previously obtained a statement indicating that coworkers had agreed to his account of events.

By decision dated May 4, 1998, the Office denied appellant's reconsideration request finding that appellant's statement was repetitive, was of an immaterial nature, and, thus, not sufficient to warrant review of the prior decision.²

The Board finds that appellant did not establish that he sustained a recurrence of disability.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.³

Appellant claimed a recurrence of disability of October 2, 1996 stating that his job duties had changed to include the duties of a registered mail clerk. Appellant listed the activities he engaged in as: dispensing of accountable mail to carriers; locating letters and packages for redelivery; answering telephones; and inputting express mail labels in the computer. The employing establishment stated that although appellant's light-duty position was changed, he

² In a decision dated November 25, 1998, the Board dismissed appellant's appeal, docket number 98-2305 for lack of jurisdiction. In a March 29, 1999 decision, the Board vacated its prior order and reinstated appellant's appeal finding that the original order contained an error of fact regarding the date of the decision which appellant was appealing.

³ *Gus N. Rodes*, 46 ECAB 518 (1995); *Cynthia M. Judd*, 42 ECAB 246 (1990); *Terry R. Hedman*, 38 ECAB 222 (1986).

was only responsible for completing notices to postal patrons and answering telephones and was not required to work outside his medical restrictions. The Office informed appellant that he needed to provide proof that he was performing duties which were not within his medical restrictions. Appellant never submitted any affidavits, but alleged that he provided customer service over the telephone and wrote-up notices for parcels which required excessive movement of the back and neck. In denying appellant's recurrence claim, the Office found that the duties appellant was performing were within his medical restrictions and thus corresponded directly with his approved light-duty assignment. Therefore, the Office reasoned that appellant's duties were within his medical restrictions.

The Board finds that although appellant alleged that he would locate letters and packages for redelivery and carry the package, regardless of the weight, to the proper location for delivery, the evidence of record fails to support such allegation. Appellant had indicated that he could obtain affidavits to substantiate that he was required to perform such duties, but no affidavits were submitted. Furthermore, the medical evidence of record is devoid of a finding that appellant was unable to perform the light-duty assignment. The Board notes that although Dr. Kaplan's July 3, 1997 report discussed appellant's condition during the requisite time period of the alleged recurrence, there is no indication that appellant's spinal instability rendered him unable to perform the light-duty assignment. Accordingly, the Board finds that the evidence of record does not establish either a change in the nature or extent of appellant's injury-related disability or the nature and extent of the light-duty position.

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion.

Section 8128(a) does not require the Office to review final decisions of the Office awarding or denying compensation. This section vests the Office with the discretionary authority to determine whether it will review a claim following the issuance of a final decision by the Office.⁴ Although it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under 5 U.S.C. § 8128(a),⁵ the Office, through regulations, has placed limitations on the exercise of that discretion with respect to a claimant's request for reconsideration. By these regulations, the Office has stated that it will reopen a claimant's case and review the case on its merits whenever the claimant's application for review meets the specific requirements set forth in sections 10.138(b)(1) and 10.138(b)(2) of Title 20 of the Code of Federal Regulations.

To require the Office to reopen a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

⁴ *Gregory Griffin*, 41 ECAB 186 (1989).

⁵ *See Charles E. White*, 24 ECAB 85 (1972).

- “(i) Showing that the Office erroneously applied or interpreted a point of law; or
- “(ii) Advancing a point of law or fact not previously considered by the Office; or
- “(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”⁶

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁷

Evidence which does not address the particular issue involved,⁸ or evidence which is repetitive or cumulative of that already in the record,⁹ does not constitute a basis for reopening a case. However, the Board has held that the requirement for reopening a claim for a merit review does not include the requirement that a claimant must submit all evidence which may be necessary to discharge his or her burden of proof. Instead, the requirement pertaining to the submission of evidence in support of reconsideration only specifies that the evidence be relevant and pertinent and not previously considered by the Office.¹⁰ Such evidence was not submitted here.

In the October 22, 1997 reconsideration request, appellant submitted an excerpt from the Office's October 8, 1997 memorandum which noted that appellant had stated that his job description included the duties of registered mail clerk and listed the activities appellant's claimed to be involved in. The excerpt was marked affidavit for reconsideration and signed by two separate individuals who indicated that they agreed with appellant's account of events. The signed statements, however, are insufficient to support appellant's allegations that he performed additional duties. There is no indication that the witnesses were postal employees, whether they worked with appellant and when, and whether they knew what occurred in regards to appellant's duties, and how and when they became aware of it. Without this pertinent information, there is no basis for the witnesses knowledge of the additional duties appellant stated he performed. Thus, the Board finds that the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits.

In the April 26, 1998 reconsideration request, appellant failed to advance substantive legal arguments and failed to include any new and relevant evidence not previously considered by the Office. Appellant merely asserted that he had previously obtained a statement indicating that his coworkers had agreed to his account of events. The Office noted that its January 5, 1998

⁶ 20 C.F.R. § 10.138(b)(1).

⁷ 20 C.F.R. § 10.138(b)(2).

⁸ *Edward Matthew Diekemper*, 31 ECAB 224 (1979).

⁹ *Eugene F. Butler*, 36 ECAB 393 (1984).

¹⁰ *See Helen E. Tschantz*, 39 ECAB 1382 (1988).

decision informed appellant that a more probative statement was required. The Office noted that appellant's reconsideration request constitutes a duplicative argument which remains unverified.

The Board has undertaken a limited review of this application and its accompanying evidence and notes that it fails to advance substantive legal questions or present new and relevant evidence not previously considered by the Office such that it does not verify whether appellant worked additional duties outside his work restrictions while on light duty. Therefore, it does not constitute a basis for reopening appellant's claim for further merit consideration, and the Office did not abuse its discretion by refusing to reconsider appellant's claim on its merits.

The Board further finds that the Office did not meet its burden of proof to modify appellant's compensation effective August 30, 1997 based on his loss of wage-earning capacity.

Section 8115(a) of the Federal Employees' Compensation Act, titled "determination of wage-earning capacity,"¹¹ provides in part that "the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity." The Office's procedure manual states, "After the claimant has been working for 60 days, the [Office] will determine whether the claimant's actual earnings fairly and reasonably represent his or her [wage-earning capacity]."¹² Once the Office accepts a claim and pays compensation, as here, it has the burden to justify termination or modification of compensation benefits.¹³

In this case, appellant started his light-duty position on September 26, 1996 and stopped work on October 2, 1996 due to his alleged recurrence. As appellant had only worked approximately one week in his light-duty position, the Office's decision that the position fairly and reasonably represented his wage-earning capacity was premature under the Office's procedure manual. Moreover, in light of Dr. Kaplan's July 3, 1997 report in which he discusses appellant's neurological deficits, the need for spinal fusion surgery, and rehabilitative care necessary to prevent deconditioning for the period October 16 through December 16, 1996, doubt is raised concerning appellant's ability to perform this light-duty position. Accordingly, the Board finds that the Office did not meet its burden of proof and reverses the Office's October 14, 1997 decision in which they found that the position of letter carrier modified fairly and reasonably reflected appellant's wage-earning capacity.

The decisions of the Office of Workers' Compensation Programs dated May 4 and January 5, 1998, October 15 and October 14, 1997 are affirmed in part and reversed in part.

Dated, Washington, D.C.
August 20, 1999

¹¹ 5 U.S.C. § 8115(a).

¹² Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.804.79(c)(1) (December 1993).

¹³ *Mary Jo Colvert*, 45 ECAB 575 (1994).

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Member

Willie T.C. Thomas
Alternate Member

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